Vol. 2 No. 5 June 1997

CHILDREN'S LAW PROJECT

REASONABLE EFFORTS REQUIREMENTS

The Child Protection Reform Act of 1996 has specific findings that the court must make at the probable cause hearings about whether the Department of Social Services has made reasonable efforts to **prevent the child's removal from the home.** This has left people asking what "reasonable efforts" means. This article will focus on the issue of reasonable efforts as it relates to preventing the child's removal from the home.

In 1980 the federal government recognized that a finding regarding reasonable efforts is a key element in protecting children. The reasonable efforts requirement was meant to assure that adequate and appropriate services are provided to families in crisis to prevent the separation of families by having the children removed from their homes and placed in foster care. Effective October 1, 1983, the Adoption Assistance and Child Welfare Act of 1980 (AACWA) requires in every maltreatment case, that reasonable efforts will be made: (1) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his or her home; and (2) to make it possible for the child to return safely to his home [42 U.S.C.A. §671(a) (15)]. The Act also requires the development of case plans for every child in foster care. Additionally, 45 Code of Federal Regulations § 1356.21 provides that states must develop a policy and standards to determine the "reasonable efforts" standards for the child and the family. 45 Code of Federal Regulations §1357.15 requires the states to include a description of the services offered and the services provided to prevent removal of the child from the home and to reunify the family in their state plan. Those services must include, but are not limited to, services such as: homemaker services; day care; individual and family counseling; access to emergency financial assistance; mental health, drug and alcohol abuse counseling.

CHILD SAFETY

The provision for reasonable efforts is not a substitute for the children's safety. The child's safety must always come first and nothing in the reasonable efforts requirement makes the agency or the court endanger the child. In fact, if the Department is found not to have made reasonable efforts in a particular case, the consequences are that they will lose federal foster care funds for that child, not that the child has to be returned to an unsafe home.

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The provisions for reasonable efforts include identifying specific problems within individual families and evaluating the type of services that could be offered to that particular family that might result in diverting the child from foster care. In assessing whether reasonable efforts can result in preventing children from entering foster care several questions should be addressed: (1) What is the harm that removal is designed to prevent? (2) Can less intrusive measures than placement prevent that harm? (3) Which services other than placement have been considered and rejected and why? (4) Which services have been offered to the family and rejected?[1] All parties, case workers, guardians ad litem, attorneys and judges, have oversight responsibilities to ensure that the reasonable efforts provisions to prevent the removal or to reunite the family have been followed.

SOUTH CAROLINA LAW ON REASONABLE EFFORTS

For example, if a newborn infant tests positive for drugs or alcohol, the caseworker should consider the entire family resources, including identification of the family's strengths and weaknesses. §20-7-736 provides a rebuttable presumption that the agency should take custody of a new born infant that tests positive for drugs or alcohol. The following conditions must be met: **either** the mother has had two positive tests while giving birth to children **or** the infant is the second child who has tested positive for drugs or alcohol or the second child has been diagnosed with fetal alcohol syndrome. A key provision under this section is that the agency would not automatically assume custody of the infant if there is another adult in the home. The agency should also explore all of the family's resources, including the extended family for possible kinship placement. Concrete services for drug treatment should be offered in a timely fashion. The agency should take into the account any waiting list for services such as drug treatment or parenting skills courses. If there is a waiting list the agency should consider other community resources. The agency should consider which assessments should be made by professionals, especially determinations such as whether inpatient or outpatient treatment services are appropriate and available for that particular family.

There are several areas in the new Child Protection Reform of 1996 that reaffirm and strengthen the provisions which require the agency to make "reasonable efforts" to prevent the child from coming into foster care. Utilization of services, however, cannot occur without access to services. The components of access to services must include: awareness of need, availability and geographic access, ability to obtain the services and financial access, acceptability by the client or confidence in the services provided and being comfortable with the service provider, the appropriateness of the services and whether the social and\or cultural needs are being met.[2]

The creation of temporary crisis homes for up to 72 hours with the consent of the parents can be a useful tool to prevent placement of children in foster care (§20-7-635). Under §20-7-610 the agency has an opportunity to divert the child from foster care if law enforcement takes emergency physical custody. The agency may return the child home or place the child with relatives or other appropriate adults after making a preliminary investigation.

The agency must make reasonable efforts to prevent the child's removal from the home. At the probable cause hearing the family court will consider the following factors in determining whether reasonable efforts were made:

- services made available to the family before DSS assumed legal custody;
- efforts to provide services to the family prior to the removal;
- why the services offered did not eliminate the need for the removal;
- the outcome of the family meeting, or the reasons the family meeting was not held; and
- whether the efforts were reasonable, including availability, timeliness, adequacy of services, and reasonableness of efforts to place with relative or in other familiar environment.

At the removal or the merits hearing under §20-7-736, the court will make specific reasonable efforts findings. These specific findings provide guidance to all parties about whether the agency's efforts were reasonable since the federal legislation does not clearly define "reasonable efforts." The family court's findings must include:

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[1] Making Reasonable Efforts: Steps for Keeping Families Together, National Council of Juvenile and Family Court Judges, Child Welfare League of America, Youth Law Center and National Youth Law Center, p. 100.

[2] Model Questions for Defining Reasonable Efforts, Youth Law Center

- the type of service offered to the family **before the removal** and how **these services relate to the needs of the family;**
- the agency's efforts to provide services to the family before the child was removed from the home;
- the reason the agency's efforts to provide the services to the family did not prevent the removal from the home;
- whether the agency's efforts were timely, available, adequate and realistic under the circumstances.

The agency is not required to offer reasonable efforts and services if it is clear at the first contact with the family that there were no reasonable services which the agency could offer which would have allowed the child to remain in the home. This provision allows the agency to keep the child's safety in the forefront. Obviously if the child is in imminent and substantial danger reasonable efforts may not eliminate the need to remove the child from the home.

COURT DECISIONS ON REASONABLE EFFORTS

The courts have reviewed the issue of enforcing the provisions of the Adoption Assistance and Child Welfare Act, Norman v. Johnson, 739 F. Supp. 1182 (N.D. Illinois 1990). The United States District Court adopted a consent order agreed to by the parties that the state must develop a plan for "reasonable efforts" prior to placing children in foster care. The parents filed an action to enforce the AACWA provisions as a §1983 civil rights claim. The parents were "impoverished parents and legal guardians who have lost, are at risk of losing, will lose, or cannot regain custody of their children because they are homeless or unable to provide food or shelter for their children." However, the United States Supreme Court in Suter v. Artist M., 503 U.S. 347, 112 S.Ct. 1360 (1992) held that the AACWA does not create rights enforceable in a §1983 civil rights violation action and the act did not create an implied private cause of action.

The second provision of the AACWA regarding reasonable efforts includes a requirement for specific case by case analysis of the needs of the families with a targeted placement plan including services that relate to the reasons for the removal. For parents with special needs such as literacy problems or transportation difficulties the plan should be developed based upon that parent's needs. A requirement that someone with an IQ of 62 arrange their own transportation to parenting classes and visitations is unreasonable. However, the paramount consideration by the family court is the best interest of the children as opposed to a focus on the needs of the mother, Dorchester County Department of Social Services v. Miller, 477 S.E. 2d 476, (Ct. App. 1996). The family court judge ordered that the agency end the reunification efforts between the parent and the children where there was a long history of physical abuse and involvement with the agency for reunification purposes. Also see, *Evaluating a Placement Plan*, in 2 Children's Law Report No. 2 (Mar. 1997) for an analysis of how to evaluate the appropriateness of services for reunification.

POSSIBLE FEDERAL AMENDMENT TO REASONABLE EFFORTS

Congress is considering major revisions to the reasonable efforts requirement in HR 867 under 42 U.S.C. 671 (a) (15). The amendment provides that reasonable efforts are not necessary if: (1) reasonable efforts are inconsistent with the permanent plan for the child; (2) the child has been subjected to aggravated circumstances of abuse or the parental rights of the parent to a sibling have been terminated involuntarily. In determining reasonable efforts the child's health and safety shall be of paramount concern. Efforts must be made to place the child for adoption or in a permanent home if the circumstances fit one of the two above referenced exceptions to reasonable efforts.

Technical Assistance Available

The Children's Law Project staff and consultants are available at no cost to assist court appointed attorneys with individual cases representing children or guardians ad litem in civil cases and solicitors in criminal cases. The technical advise can include all types up assistance, including but not limited to: research, writing briefs, second chairing trials, preparing witnesses. Volunteer guardians ad litem should make contact with the Children's Law Project through their attorney or program staff. For assistance with family court matters contact at Mary Williams (803) 777-1795. For assistance with criminal court matters please contact Heidi Holland at (803) 777-3843.

Recent South Carolina Case

Admissibility of Behavioral Scientist's Expert Opinion

State v. Morgan, Opinion # 2653 (Filed April 7, 1997 S.C. Ct. App.)

This case was an appeal of a conviction for first degree criminal sexual conduct with a minor. The ten-year-old victim testified at trial that her step-grandfather, Morgan, had sexually assaulted her in February 1994 and on five to ten other occasions before then, beginning when she was four or five years old. At trial, the State offered the testimony of two expert witnesses. Morgan argued on appeal that the trial court erred in admitting the two expert opinions because they had not been shown to have scientific reliability. The Court of Appeals affirmed Morgan's conviction.

The first expert offered by the State was the physician who had examined the child on two occasions three to four weeks after the assault. The physician's testimony was offered for her opinion that the child had been sexually abused despite the fact that the medical exam was "totally normal." The physician based her opinion on the history which the child had given her and her actual observation of the child's behavior during the two physical exams.

The second expert was a mental health counselor who had interviewed the child four times beginning about four months after the incident. Her testimony was offered to prove that the child's behavior was consistent with that of a sexually abused child. The counselor based her opinion on interviews with the child and the child's mother, observations of the child's symptoms and behavior, and assessment of the child's drawings.

Morgan argues that neither of the experts' opinions had the proper basis of scientific reliability and therefore should not have been admitted. Morgan cited the federal standard for admitting scientific evidence, Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). In its opinion, the Court of Appeals points out that South Carolina never adopted Daubert or its predecessor Frye v. United States, 54 App.D.C. 46, 293 F. 1013 (1923) as the standard for determining admissibility of scientific evidence. Rather, "at least prior to the adoption of the [South Carolina Rules of Evidence] SCRE," the more liberal standard set in State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979) was used by South Carolina courts.

The Court goes on, however, to hold that under State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) the "admissibility of the two behavioral science expert opinions at issue was not subject to admissibility challenges based on reliability"[3]. The Court did note that this type of evidence is "still subject to the challenges that its probative value is outweighed by its prejudicial effect."

The Court also pointed out that the SCRE were inapplicable to the present case since they became effective two months after the trial.

The Court additionally examined State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979), for the proposition that admissibility of scientific evidence depends on whether the experts relied on scientifically established techniques. The Court noted, however, that the South Carolina Supreme Court in State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991), held that not all expert testimony is subject to a Jones challenge. Instead the first issue is whether the "expert's methods and techniques even fall within Jones' central purpose: to prevent the aura of infallibility which surrounds 'scientific hypotheses not capable of proof or disproof in court and generally not acceptable outside the courtroom' from misleading the fact finders."[4]

But the Court points out that not only did Schumpert overrule Hudnall, but it also held the Jones-type analysis inapplicable to behavioral scientist's expert opinion testimony.

The Court concludes that although behavioral science testimony can still be challenged on whether its probative value outweighs its prejudicial effect, Morgan did not raise an unfair prejudice argument in his appeal. As a result, since there was no showing that the trial court abused its discretion in qualifying the experts, the conviction was affirmed.

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[3]Page 26 of Opinion. The Court goes into a lengthy review of the case law and analysis under State v. Hudnall, 293 S.C. 97, 359 S.E.2d 59 (1987) and its progeny, but concludes that that type of analysis of expert behavioral science evidence was overruled by Schumpert.

[4]*Citing* Jones, 273 S.C. at 731, 259 S.E.2d at 124.

Publication Notes

Distribution of the May issue of *the Children's Law Report* was delayed while the mailing list was updated and improved. Please remember to notify the Children's Law Project of any address changes.

Coming in July ...
Summaries of New South Carolina Laws Related to Child Welfare.

Part III: Current Activities Influencing the Child Welfare System

This is the third in a series of articles discussing current circumstances in South Carolina which affect the child welfare system. Future initiatives or changes will be reviewed as they unfold. All agencies and organizations are encouraged to use the *Children's Law Report* as a vehicle to exchange information among social services staff, attorneys, judges, guardians ad litem, counselors, and others involved with abused and neglected children. In this issue, the Managed Treatment Services Program and the activities of the Child Protection Advisory Committee are summarized.

Managed Treatment Services

Case management for emotionally disturbed children in DSS custody is now provided through Managed Treatment Services (MTS), a new division within DSS. Intensive case management functions for children in foster care were previously performed by the Continuum of Care for Emotionally Disturbed Children, while custodial functions were the responsibility of the DSS foster care worker. Through a restructuring initiative by the Office of the Governor, effective July 1, 1996, these functions were combined in the role of the MTS worker. This single case manager is responsible for intensive management of services, using the tenets and principles employed by the Continuum of Care, as well as preparation for court hearings, coordination with the Foster Care Review Board, and various custodial functions. This change was designed to reduce the duplication of case management services, thus reducing costs, improving service delivery, and providing a single point of contact for the child and his/her parents or relatives. Case management for approximately 1200 children was transferred from the Continuum to MTS.

The restructuring was accomplished through the transfer of 190 positions from the Continuum of Care to DSS. MTS is integrated into DSS and works closely with protective services, foster care, and adoptions.

County interagency staffing teams remain in place for children in DSS custody. The team must approve initial therapeutic placements and any changes in a child's level of care. The Continuum of Care continues to provide comprehensive services to approximately 215 emotionally disturbed children who are not in the custody of DSS.

Child Protection Advisory Committee

The South Carolina Child Protection Advisory Committee (SCCPAC) was established in 1973 as an outgrowth of the South Carolina Medical Association Alliance. It provides a forum for agency and community representatives to address issues of abuse and neglect and optimal child development. SCCPAC's mission, to strengthen the systems which serve children and families, has been maintained over the years. The Child Protection Advisory Committee is a community education and social action group, supportive to the efforts of parents, agencies, and the public in the care of children as it relates to abuse and neglect.

In February 1997 this committee coordinated a multi-agency conference, *Through the Eyes of a Child,* which focused on the rapid changes affecting the delivery of services to children. The conference featured SCCPAC framed artwork created by children in foster care. The artwork and stories reflect children's feeling about foster care and adoption. An April 1998 conference is begin planned with the same theme and a similar focus. The SCCPAC will continue to honor the children's effort by providing a forum for agency and community representatives to address child-related issues, and to promote education and advocacy on optimal child development. By working together and sharing talent, time, resources and vision, SCCPAC hopes to assure a positive and hopeful future for the young "artists" of South Carolina.

For more information about the work of the Child Protection Advisory Committee, contact Paddy M. Bell, Chairman (803)783-4696.

Termination of Parental Rights

This is the last article outlining the changes to the child maltreatment statutes under the Child Protection Reform Act of 1996 which took effect on January 1, 1997.

One of the major efforts of the Child Protection Reform Act of 1996 was to ensure that each child obtained the most permanent situation possible. Thus it is not surprising to discover that the new act included some significant changes in the statute concerning termination of parental rights. The major changes concern: 1) the right to counsel; 2) a change in the ground related to diagnosable condition; 3) the deletion of the reasonable efforts requirement from the ground of the parents' failure to rehabilitate. Note that other sections of the Child Protection Reform Act still require reasonable efforts on the part of the Department but lack of reasonable efforts is no longer a basis for denying a TPR petition.

Any interested party may file a petition seeking termination of parental rights, i.e., foster parents, guardians ad litem, etc.

One of the most important changes that took place is the right to counsel. The new act clearly states that indigent parents are entitled to appointed counsel in termination of parental rights cases unless they are in default. Similarly children, in termination of parental rights actions, must be appointed a guardian ad litem. If a nonattorney guardian ad litem finds that appointment of counsel is necessary to protect the child's rights and interest, an attorney must be appointed. The court can decide on a case by case basis, if an attorney guardian ad litem should be appointed counsel to represent him or her. But the statute requires appointment of an attorney for the guardian ad litem in every termination of parental rights case which is contested.

The new act requires that in order to terminate parental rights, the court find that termination of parental rights is in the "best interest of the child". The grounds for termination of parental rights are:

- severity or repetition of the abuse or neglect is such that it is not reasonably likely that the home can be made safe within twelve months;
- child has lived outside their parents' home for six months or more and parent has not remedied condition which resulted in the child's removal (*note that the requirement that the agency make a reasonable and meaningful effort to offer rehabilitative services has been deleted from this ground);*
- child has lived outside the home for six months and parent(s) willfully failed to visit;
- child has lived outside the home for six months and parent(s) willfully failed to support;
- presumptive legal father is not the biological father of the child and the welfare of the child can be best served by terminating the legal father's rights;
- diagnosable condition of alcohol or drug addiction, mental deficiency and/or mental illness (*there is a presumption that the diagnosable condition of alcohol or drug addition is unlikely to change in a reasonable time if the parent has failed to participate in two or more treatment programs or has refused at two or more separate meetings with the department to participate in a treatment program.)*

If an attorney is representing a parent who is being uncooperative, and DSS is alleging a drug problem, the attorney will want to help them understand this new language.

The court can grant or deny the TPR petition, but if TPR is denied the court must specify a new permanent plan or order a hearing on a new permanent plan. If the hearing is required, the law states it must be held withing 15 days of the denial of the TPR petition and before the same judge if possible. If the court determines that an additional permanency planning hearing is not needed, the court can: (1) grant custody to the biological parents, but only if the parents have counterclaimed for custody and there is no unreasonable risk of harm to the child; or (2) order another permanent plan permitted under the law.

IOLTA Grant Given to Children's Law Project

The South Carolina Bar Foundation awarded CLP a grant to: 1) update "Representing Children in Family Court: A Resource Manual for Attorneys and Guardians Ad Litem" produced by the Children's Committee and CLE Division of the State Bar; 2) put together a users' manual for attorneys appointed to represent parents in child abuse and neglect cases; 3) compile a Directory of Service Providers for participants in the child welfare system; and 4) conduct outreach, training and technical advice for court appointed attorneys through the County Bar Associations.

Roundtable to be Held
Court Practices for Child Witnesses

The Children's Law Project will sponsor a "roundtable" to explore court practices used when children testify in court. This event will combine training, a panel presentation, and group discussion to develop a common understanding of good and legally sound methods of utilizing children's testimony. Both child protection and criminal child abuse proceedings will be addressed. The primary speaker will be Brian Holmgren, Senior Attorney with the National Center on Prosecution of Child Abuse. A manual on court practices for children will be produced in conjunction with the roundtable. Specific topics will include: court preparation, competency evaluations, courtroom facilities, memory and suggestibility, and alternatives to live testimony such as videotaped or closed-circuit testimony and hearsay exceptions.

Participation is limited to 100 individuals who are involved with children in court. Representation will be sought from all of the following groups: attorneys for guardians ad litem or children; attorneys for parents or defendants; attorneys for the Department of Social Services; solicitors; guardians ad litem for children; law enforcement; judges; mental health professionals; caseworkers; and victim advocates. Participants will be asked to review a draft of the Court Practices Manual prior to the event, and to submit comments for its finalization afterwards.

If you are interested in participating in this event, please fax or mail the following information to the Children's Law Project. You will be notified of space availability. A $10 registration fee (payable at the door) will cover lunch and morning refreshments.

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Court Practices For Child Witnesses
June 27, 1997

Name _____ Phone _____

Organization _____

Address _____

_____

Which of the following most clearly identifies your role? (Circle)

*Attorney for guardians ad litem / children
*Attorney for parents
*Attorney for defendants
*Attorney for DSS
*Solicitor
*Guardian ad litem for children
*Law enforcement
*Judge
*Mental health professional
*Caseworker
*Victim advocate
*_____

Do you work primarily in Family Court or General Sessions Court? _____

Mail to: Children's Law Project, Carolina Plaza, 12th Floor, Columbia, SC 29208
Or fax to: (803) 777-8686

In-Service Training Available

The Children's Law Project is available to conduct training for organizations and groups on a variety of subjects related to child abuse and neglect. Presentations can be made addressing legal issues of interest to your group. Training is offered to groups of any size and can be tailored to meet your needs as to length and time of day. Please call (803) 777-1646 to schedule your in service training. Possible topics include, but are not limited to:

- Overview of the Child Protection Reform Act
- The Reasonable Efforts Requirement
- Termination of Parental Rights
- Preparation of Children for Court
- Role of Mandated Reporters
- Preparing Nonlawyers for Testifying in Court
- Reviewing and Rebutting Treatment/Placement Plans
- Criminal Process/Working with Solicitors
- Additional Services Available for Foster Children
- Introduction to Evidentiary Rules
- Parents' Rights in Child Abuse Cases
- Interrelationship between Spouse Abuse and Child Abuse
- Motions and Rules: When, How and Why in Child Abuse Cases
- Alternative to Children's Testimony
- Examination and Cross-Examination of Experts

CHILDREN'S
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